

Duration of ISDS Proceedings

ISDS Academic Forum – Working Group 2

I) Introduction

The length of proceedings, and the resulting impact on costs, has long been a topic of considerable importance for arbitration: quick proceedings when compared with national courts are praised as an advantage of arbitration, a lack of speed is widely perceived by users as one of the downsides of international arbitration.¹

In the current debate about ISDS reform, the length of ISDS proceedings, alongside their costs, has been raised as a growing concern among the members of UNCITRAL Working Group III, which discussed the topic of cost and duration at its thirty-fourth session.² More specifically, '[i]t was widely felt that lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors...'³ Additionally, 'there was a shared understanding that the duration and cost of the proceedings were interlinked, as lengthy proceedings were likely to result in higher costs.'⁴

UNCITRAL Working Group III has given some indications as to how to approach the topic of duration of proceedings. As summarized by the UNCITRAL Secretariat in its note on cost and duration of ISDS proceedings, the UNCITRAL Working Group emphasized that, on the one hand, 'cost and duration of ISDS proceedings should not be examined in isolation, but by reference to suitable comparators, which might include other international dispute settlement bodies such as the International Court of Justice (ICJ) and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO), and domestic court procedures';⁵ on the other, '...notions of cost and duration were relative in nature, and whether the process was excessively costly or lengthy should be determined on a case-by-case basis and taking into account the need for effective administration of justice. Therefore, ...it would be important to draw a distinction between "excessive" or "unjustified" time and cost on the one hand, and "necessary" or

¹ With reference to arbitral proceedings on cross-border disputes the 2018 School of International Arbitration and White & Case International Arbitration Survey confirmed that improving the overall efficiency of arbitral proceedings and lack of speed are still concerns for all stakeholders involved. (p. 37)

² UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1, paras 36-51. See also UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 2 ('In summary, the current ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method for resolving investor-State disputes...Accordingly, concerns were expressed regarding increasingly high costs and lengthy proceedings).

³ UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1, para 36.

⁴ Ibid., para 38.

⁵ UNCITRAL Secretariat's Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 11.

“justified” time and cost on the other. In that regard, it was noted that the quality of outcomes should be balanced with the desire to reduce cost and duration.’⁶

This paper attempts to evaluate the impact on the duration of ISDS proceedings of the following four alternative reform options: (i) ‘IA improved’ (procedural changes, including appointment of arbitrators), (ii) ‘IA + appellate mechanism’, (iii) ‘multilateral investment court’, and (iv) ‘no ISDS’ (with alternative domestic court and State-to-State sub-scenarios). In carrying out this evaluation the present working group decided to take a data-centric approach. Following the proposals of the UNCITRAL Working Group it will include comparators, namely the length of WTO proceedings, the length of domestic litigation, and that of interstate investment proceedings.

Before proceeding to the substantive analysis, the paper will clarify the notion of “excessive” length of proceedings (II). It will then present data on duration of investment arbitration proceedings stemming from different data sets (III). It begins with ICSID’s own study on the duration of ICSID arbitration proceedings (1), then presents data from PluriCourt’s Investment Treaty Arbitration Database, created by Daniel Behn and Malcolm Langford in Oslo (2); and finally data from a dataset developed for this paper by Holger Hestermeyer, Clara López Rodríguez and Simon Weber at King’s College London (3). It then presents the data on the length of proceedings before the WTO Dispute Settlement Body (IV). With regard to the latter data, we are grateful to Joost Pauwelyn and Weiwei Zhang for giving us access to their dataset developed with funding by the SNF in the context of the Project “Convergence versus Divergence? Text-as-data and Network Analysis of International Economic Law Treaties and Tribunals.” Finally, the paper turns to the various reform proposals and their impact on the length of ISDS proceedings, tackling in turn the improvement of the current system (V), the addition of an appellate mechanism (VI), the multilateral investment court (VII) and the abolition of ISDS (with alternative domestic court and State-to-State sub-scenarios) (VIII).

In carrying out this evaluation the working group faced a number of challenges. First of all, none of the afore-mentioned reform scenarios has been intended to specifically address the duration of ISDS proceedings except for (i) ‘IA improved’. As a result, the impact on the duration of ISDS proceedings seems to be more of a collateral damage or benefit of the reform proposals under discussion. It is, accordingly, no surprise that the impact on the duration of ISDS proceedings of the reform scenarios is not always easy to ascertain.

Secondly, while the use of comparators can give a rough indication of the duration of alternative procedural arrangements, it has to be born in mind that neither the selection of the data used as comparators, nor the comparison itself is straightforward. The average length of proceedings differs considerably from one court system to another, given that the jurisdictional scope of and the law applicable by each court system significantly vary from one to another. Even within the same court system different procedures might result in different durations of proceedings. The case of the Court of Justice of the European Union is illustrative. In the Court of Justice of the European Union in 2017, the average duration of proceedings before the Court of Justice

⁶ UNCITRAL Secretariat’s Note, Possible reform of investor-State dispute settlement (ISDS)-cost and duration (A/CN.9WG.III/WP.153, 31 August 2018), para 12. [Emphasis in original]

and the General Court was 16.4 months, and 16.3 months, respectively. However, the average duration of urgent preliminary rulings was a mere 2.9 months.⁷ Finally, once data of comparators has been established, one has to bear in mind that the types of disputes at issue and the procedural setup differ significantly from ISDS.

Thirdly, the length of investment arbitration proceedings is so heavily fact-specific that it seems to defy all attempts at generalisation. Multiple factors may influence the duration of an ISDS case. Among these are factors contingent on the features of the case itself (for instance, the complexity and intricacy of the factual and legal background, which can lead the tribunal to decide for bifurcation), and factors depending on the disputing parties' conduct in the procedure (for instance, the lack of mutual agreement on arbitrators, their request for additional time to submit their briefs, or their decision to put the dispute on ice while trying to settle). There can also be factors resting with arbitrators; for instance, an arbitrator can fall ill or even die, or she can be well-organised or poorly organised, she can focus more or less on a specific arbitration, tight work schedules can make the coordination of dates for hearings difficult and she can benefit from more or less administrative help. Furthermore, a respondent State that is losing its case might have an incentive to delay the proceedings. Not all of the afore-mentioned factors are transparent for the observer, but they clearly have an impact on the duration of proceedings.

Finally, short proceedings are not automatically better proceedings. It is important to bear in mind that proposals to shorten ISDS proceedings can affect dispute resolution in complex ways and usually involve trade-offs. Reducing the time for writing an award might negatively impact the quality of legal reasoning of ISDS decisions, as well as the soundness of ISDS outcomes. Shortening the procedure by limiting the numbers of submissions might affect disputing parties' right to be heard. Not all trade-offs are readily apparent. Thus, for example, short timeframes can negatively affect the capacity of poorer states to effectively participate in proceedings and significantly damage the legitimacy of the award. The approach chosen here is to point out trade-offs rather than decide which approach is the better one.

II) The notion of "Excessive" Length of Proceedings

We consciously decided not to use the word "excessive" length of proceedings in the title of this paper. While a particular proceeding might, of course, be excessively long, it is difficult, in the light of the fact-specific length of investment arbitration proceedings, to clearly categorize a particular length of arbitral procedures as "excessive" and "unjustified", or "necessary" and "justified" in the abstract.

This does not mean that the speedy resolution of cases is not important. According to an old legal maxim, "justice delayed is justice denied". This is reflected in modern human rights law. Thus, for example, the European Convention on Human Rights guarantees the right to a fair trial in its Art. 6 stating that that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law."⁸ The duration of proceedings occupies a good part of the

⁷ CJEU, 2017 Annual Report, 37-39.

⁸ Emphasis added.

workload of the European Court of Human Rights. It is worthwhile to mention some of the principles the Court has established when interpreting this requirement.

The Court has not developed fixed maximum periods for legal proceedings.⁹ Instead, it has held that the reasonableness of the length of proceedings “must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.”¹⁰ Even where proceedings as such were not excessively long, they could still be unreasonably long if the court became inactive.¹¹ On the other hand, the complexity of a case – and delay caused by the parties’ own behaviour – can also justify comparatively long proceedings.¹² The approach of the ECtHR thus confirms that judging the length of proceedings is a heavily fact-specific exercise.

III) Length of ISDS Proceedings: The Evidence

It is not easy to give precise indications as to how long the various stages of ISDS proceedings usually take: arbitration is too flexible an instrument for giving hard and fast rules.

1) Length of ICSID proceedings according to ICSID’s review of case duration

It is helpful to start our overview with ICSID’s review of case duration undertaken as part of its rule amendment project, for which it reviewed 63 cases which concluded with an Award between 1 January 2015 and 30 June 2017. The review yielded an average duration of proceedings of 1,336 days, i.e. 3 years and 7 months – 1382 days for joint proceedings, 1301 days for bifurcated proceedings (while a proceeding on merits only took 829 days). The result for bifurcated proceedings is somewhat nuanced however - it took 749 days on average for an award on jurisdiction, but 1,893 days if an award on the merits became necessary. All in all, the length of the various stages was as follows:

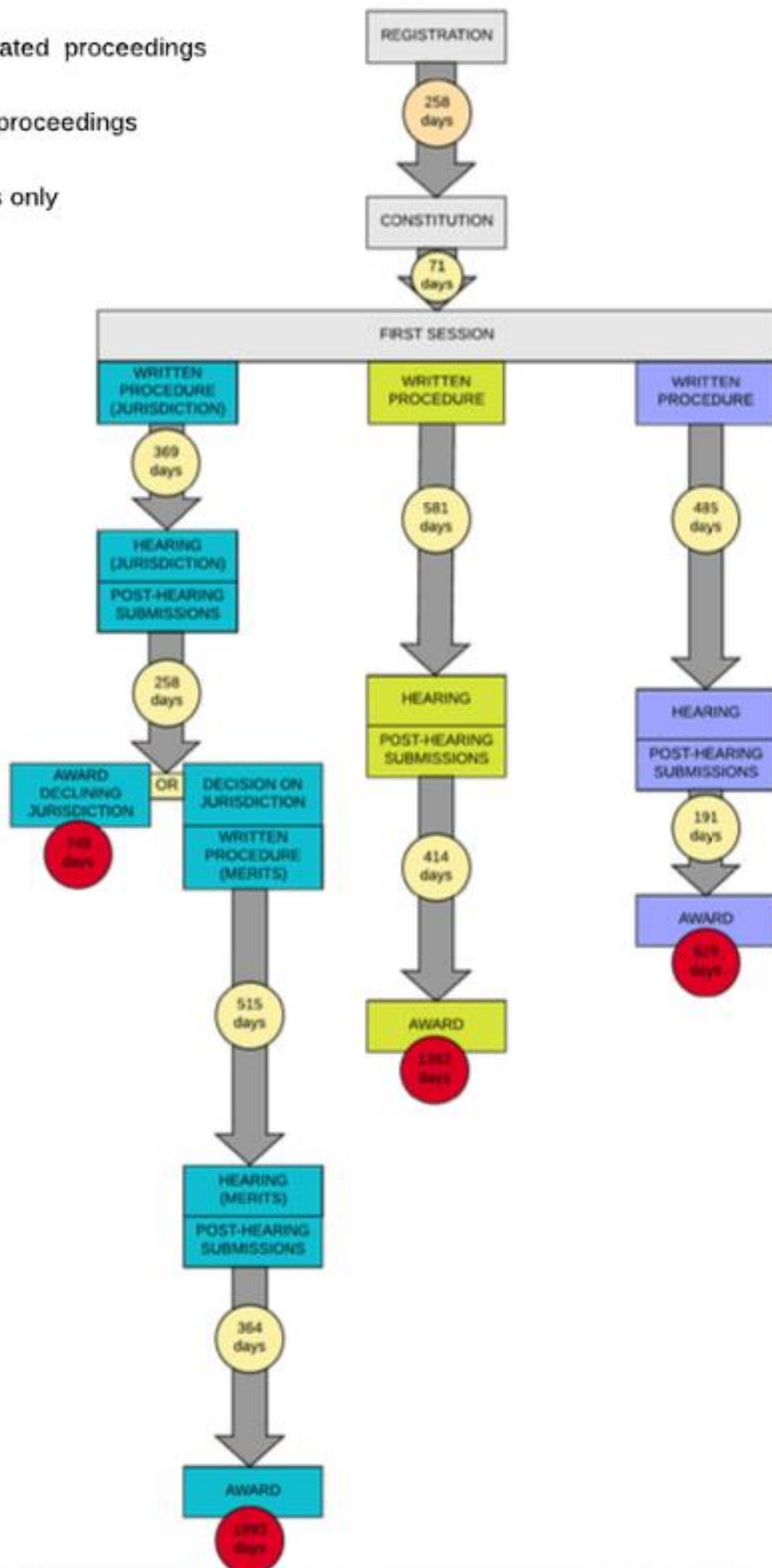
⁹ Mayer-Ladewig/Nettesheim/von Raumer (eds.), EMRK, § 6, para. 199 (4th ed. 2017)

¹⁰ *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 19; *Frydlender v. France*, no. 30979/96, § 43; *Glykantzi v. Greece*, no. 40150/09, § 47.

¹¹ *Gjashta v. Greece*, no. 4983/04, § 16; see also *Herbst v. Germany*, no. 20027/02, § 78.

¹² *Yildiz v. Germany*, no. 23279/06, § 48 et seq.

- Bifurcated proceedings
- Joint proceedings
- Merits only

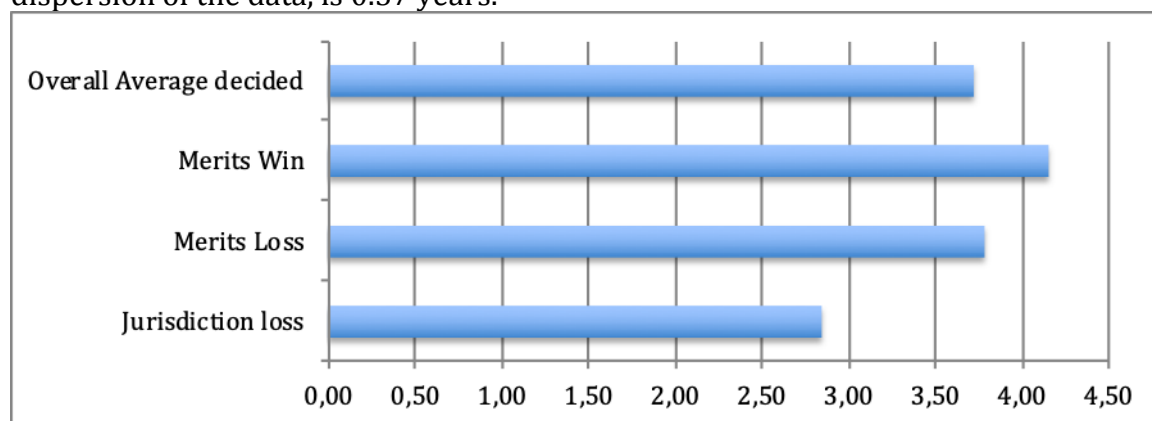


2) Length of ISDS proceedings in general and causes of delay: PluriCourt's Investment Treaty Arbitration Database

PluriCourt's Investment Treaty Arbitration Database is a comprehensive dataset on investment arbitration containing 635 cases at the time of data extraction.

Type	Cases	Days	Years	Std. Dev. - Years
Average - All	635	1263	3.46	2.2
Average: Decided	444	1361	3.73	0.57
<u>Non-Decided</u>				
Settled	97	793	2.17	1.56
Discontinued	60	1055	2.89	3.02
Settled after jurisdiction	30	1628	4.46	3.51
Discontinued after jurisdiction	4	8789	24.08	2.82
<u>Decided</u>				
Jurisdiction Loss	109	1042	2.85	1.28
Merits Loss	127	1382	3.79	1.66
Merits Win	208	1515	4.15	2.28

The average case length of decided cases is 3.73 years (1361 days, falling to 1263 days if you include non-decided cases). The standard deviation, a measure for the dispersion of the data, is 0.57 years.



Cases lost by the claimant on jurisdictional grounds are, as expected, shorter (2.85 years) than those decided on the merits (4 years on average – 4.15 for a merits win by the claimant, 3.79 for a merits loss by the claimant). Remarkably, cases won on the merits by the claimant vary considerably in terms of their length – the standard deviation is 2.28, which implies that there's an equally great chance of a merits-reaching case being 2 or 6 years long.

Type	Cases	Days	Years	Std. Dev. - Years
Average - All	87	639	1.75	0.93
Average: Decided	61	697	1.91	0.67
<u>Non-Decided</u>				
Annulment Discontinued after Failure to Pay Fees	6	574	1.57	0.90
Annulment Discontinued	20	485	1.33	1.42
<u>Decided</u>				
Annulment in Full	5	771	2.11	0.70
Annulment Partial	9	735	2.01	0.78
Annulment Rejected	47	681	1.87	0.66

Annulment proceedings take, on average, 1.91 years (1.75 if you take into account discontinued cases). Here, again, successful cases take a bit longer (2.11 years for a full, 2.01 years for a partial annulment) than rejected annulments (1.87 years). The standard deviation indicates that there's an equally good change of an annulment taking 3 as of it taking 1 year.

When it comes to identifying causes for longer arbitration proceedings, Langford et al. come to the conclusion that procedural events are the most likely to prolong arbitration: bifurcation, arbitrator challenges and replacement as well as the existence of a dissenting opinion stand out when it comes to explaining longer duration.¹³

3) Length of ISDS proceedings in general: King's College London dataset

The King's College London dataset contains 110 cases, namely all reports of all cases in the ICSID or ITA database with awards rendered in selected years (1997, 2002, 2007, 2015 and 2017), which brought the arbitration to an end. Different years were selected to include developments over time. The reason for the limited scope of the database are time and financial constraints.

59 of the awards were rendered in ordinary proceedings without annulment, 32 proceedings were bifurcated, 10 ordinary proceedings went through annulment, 9 bifurcated cases went through annulment. Not all of the cases allow a determination of the length of every stage of the proceedings as not all data is available.

The dataset yields the following averages:

- overall duration (from request for arbitration/registration to final award): 1913 days (5.2 years) (shortest 448, longest 4375)
 - o the duration of ordinary proceedings without annulment was 1468 days on average (between 448 and 2737),
 - o bifurcated or trifurcated cases without annulment took an average of 2358 days (between 1156 and 4375)
 - o annulment added an average of 907 days not counting resubmission
- The constitution of the tribunal took on average 181 days (in between 17 and 712 days)
 - o Annulment committees were constituted more quickly on average – in 103 days (in between 28 and 229)
- the written phase of ordinary proceedings without annulment took an average of 407 days (in between 30 and 1511)
 - o bifurcated cases took an average of 224 days for the 1st, 379 days for the second and 403 days for the third stage
- the post-hearing phase of ordinary proceedings took an average of 197 days (in between 13 and 697)

IV) Length of Comparative Proceedings: The WTO DSB

Since the WTO and its dispute settlement mechanism have been mentioned by the UNCITRAL Working Group itself as suitable comparator, and has inspired some of the thinking behind proposals of a court system, the WTO has been chosen as a comparator. It should, however, be pointed out that overall the WTO dispute settlement process is hardly comparable to ISDS.

1) Indicative Timeframe

¹³ M. Langford et al., What do we Know?, ISDS Forum.



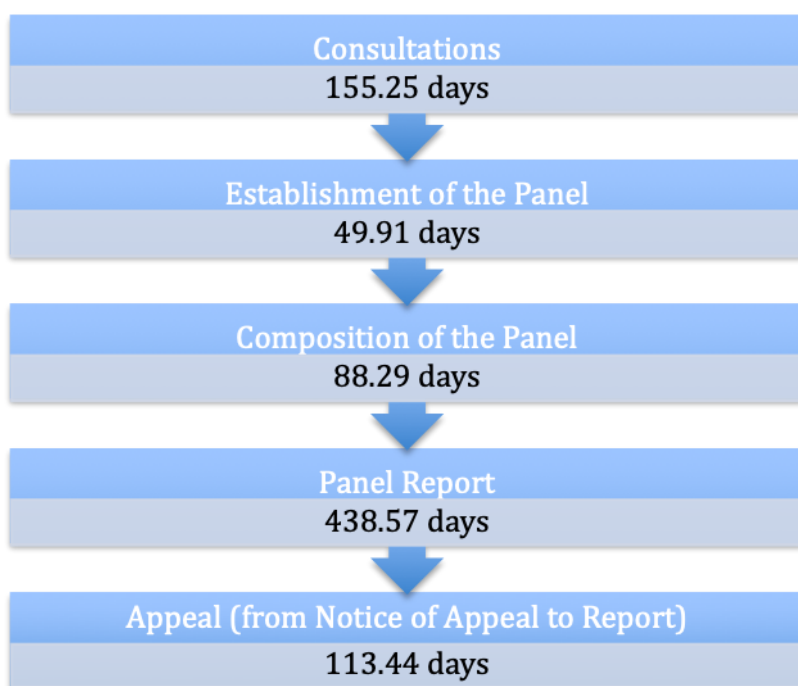
The Dispute Settlement Understanding of the WTO contains indicative time frames for many of the procedural steps. The WTO has, on its websites, conveniently translated these into target figures for each stage of the proceedings.

The time frame is represented on the left. Under the timeframe, dispute settlement is supposed to take 308.5 days until the

circulation of the Panel report and a maximum of 458.5 days until the Appellate Body Report.

2) Reality

That time frame has always been ambitious – and was meant to be flexible, given that



cases vary in complexity, from straightforward legislative discrimination to complex fact-based violation claims. Reality shows that cases vary enormously in length: The shortest case for the panel stage was *US – Shirts and Blouses*, which took just 298 days from the request of consultation to the circulation of the Panel Report. The Plain Packaging disputes (combining several disputes into one and counting from the earliest request for

consultations) needed 2276 days for the same stage. Appeals from notice of appeal to AB report took in between 57 days (*Japan – Alcohol*) and 395 days (*Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*). Average times for various stages of the procedure are given in the preceding graph. Also to be kept into account when comparing the timeline for WTO cases is that WTO remedies are only prospective, which creates greater demand for quicker proceedings.

V) IA improved

In 2018 ICSID, the leading forum in the field of investment arbitration, explicitly tackled the topic of duration and efficiency of investment arbitration in its reform exercise in Schedule 9 of its Working Paper on Proposals for Amendment of the ICSID Rules. The exercise yielded some proposals for rule amendments to speed up proceedings, which we shall list here. Where such proposals successfully shorten proceedings, they could be extended to other relevant institutional arbitration rules, if possible and unless already addressed (see ICC Arbitration Rules). Given that our empirical analysis allows the conclusion that bifurcation leads to longer proceedings, we also propose abolishing bifurcation.

ISDS could be improved as to the length of proceedings in the following ways:

(a) Speeding up the constitution of the arbitral tribunals, with the default method triggered after a certain period after the registration of the claim. The survey of the arbitral proceedings conducted by ICSID on the occasion of the amendment process showed that the average duration of the surveyed tribunal constitutions was of 258 days. This long process is explained by (i) no initial participation by the respondent due to delay in organizing its defence; (ii) methods that provide for a long appointment process; (iii) no immediate request by a party for the Chairman of the Administrative Council to appoint a missing arbitrator after the expiry of the 90-day period provided in Art. 38 of the Convention; and (iv) agreed methods that eventually lead to default.¹⁴

(b) Including a general obligation for parties and arbitrators to conduct the proceedings in an expeditious manner.¹⁵ Such obligation already exists in national arbitration laws¹⁶ and the rules of major arbitral institutions such as the ICC,¹⁷ and is also included in the UNCITRAL Arbitration Rules.¹⁸

(c) Addressing the organization of hearings and witness examination, by providing more flexibility.¹⁹ ICSID has been operating on the basis of procedural flow-charts organising proceedings on the basis of whether there are preliminary objections

¹⁴ ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. III [2018], pp. 902-903.

¹⁵ ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. II [2018], proposed Rule 11 of the new ICSID Arbitration Rules, pp. 26-27.

¹⁶ See, e.g. English Arbitration Act section 33.

¹⁷ ICC Arbitration Rules Article 22.

¹⁸ UNCITRAL Arbitration Rules Article 17.

¹⁹ ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. II [2018], proposed Rules 15 and 41 of the new ICSID Arbitration Rules, pp. 28 and 42. In respect to witnesses, the new rule provides that only witnesses who filed their written statements can testify; with respect to the organization of hearing, the new rules allows the president of the tribunal to discuss the method of holding the hearings.

and whether the parties wish to bifurcate or tri-furcate the arbitration. This entailed the risk of repeating evidentiary exercises for different aspects of the cases and having some overlaps in submissions.

(d) Speeding up the deliberation process and specifying/shortening the time limits for the delivery of the arbitral award.²⁰ One can notice from the data that the rendering of the award often takes more than six months after the final procedural action in the proceedings and awards rendered a year later are not uncommon.

(e) Probably the most significant development recorded by the proposed ICSID Arbitration Rules, and which is contemplated by the new generation of international investment agreements (see CETA, Art. 8.23(5)) and by other institutional arbitration rules (see ICC, SCC etc.) is the proposal for **expedited arbitration proceedings**, when the parties consented to it.²¹ The proposed expedited arbitration proceedings are conducted by a sole arbitrator and propose lower fees and shorter time limits, increasing thus the efficiency of the proceedings.

In addition to this, the proposed ICSID Arbitration Rules, similar to other rules, implement provisions concerning **consolidation of claims**, by the consent of the parties. The proposed Rule 38 also refers to the '**coordination**' of claims, where consolidation is not available.²²

Other areas of concern, as identified in the review of ISDS arbitral awards, as well as by ICSID during the current amendment process, are the length of the proceedings when **bifurcation** is granted (including under Rule 41(5) of the current ICSID Arbitration Rules concerning an objection that a claim is manifestly without legal merit); **the lengthy periods for the submission of written proceedings**²³ (and with this, the **documentary evidence** submitted to the tribunal), procedure for provisional measures,²⁴ etc. These are all issues which could be addressed, either in the applicable arbitration rules or by the arbitral tribunal, in its wide discretion in conducting the proceedings.

²⁰ ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. II [2018], proposed Rules 16(4) and 59 of the new ICSID Arbitration Rules, pp. 29 and 52-53. For the arbitral award, the new Rule 59(1) provides for the following:

The Tribunal shall render the Award as soon as possible and in any event no later than:

(a) 60 days after the last written or oral submission if the Award is rendered pursuant to Rule 35(4);

(b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 36(7); or

(c) 240 days after the last written or oral submission on all other matters.

²¹ See ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. II [2018], proposed Chapter XII of the new ICSID Arbitration Rules, pp. 61-67.

²² ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. II [2018], proposed Rule 38 of the new ICSID Arbitration Rules, p. 41.

²³ ICSID, 'Proposals for Amendment of the ICSID Rules — Working Paper', vol. III [2018], pp. 901-904.

²⁴ Although the request for provisional measures may be submitted with the Secretary General (Rule 39(5) of the current ICSID Arbitration Rules), before the constitution of the arbitral tribunal, the decision on the suitability of the measures belong to the tribunal and, thus, the process is closely linked to the appointment of the tribunal. In *Levi v. Peru*, claimant filed the request for provisional measures with the ICSID Secretariat on 9 September 2010 and the decision of the tribunal was issued on 17 June 2011. See, *Renée Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17).

(f) **abolish bifurcation.** As a whole, bifurcation leads to longer proceedings. While in some circumstances a successful preliminary objection phase can indeed result in a shorter proceeding, the data shows that as a whole bifurcation lengthens proceedings. On the basis of the proposed reforms we present the main advantages and disadvantages IA improvement may have in relation to duration of proceedings.

3) Advantages

1. The proposed measures can, in some circumstances, lead to shorter proceedings without introducing major changes to the system.
2. Improvements focusing on efficiency, such as reducing time limits for the constitution of tribunals, written submissions (or even limiting the round of exchanges of submissions), document production, time for deliberation and rendering of the award could be reviewed periodically as to their impact on duration.
3. Given the limited nature of the changes to the system, the door would be left open to introduce additional changes such as fixed time limits or limited hearings as is the cases in some national supreme courts (e.g. US)²⁵ or international or regional courts (CJEU).²⁶

4) Disadvantages

1. Not all of the proposed measures are likely to have a large impact. Obligations to act speedily are unlikely to yield results where such obligations are not enforced. The example of the WTO shows that indicative time frames are not always followed.
2. Some of the proposed measures involve trade-offs. Speeding up the composition of the tribunal by triggering the default method of appointment can limit the rights of the parties to determine arbitrators. The introduction of measures such as time limits can, as stated in the introduction, have an impact on quality of awards or the right to be heard.

VI) Adding an appellate mechanism

The discussion on the introduction of an appellate mechanism in investor-State arbitration is not new and it dates at least back to the 2004 proposal for the amendment of the ICSID Arbitration Rules.²⁷ While the discussions at ICSID did not progress much in that direction, the new generation of international investment agreements (IIAs), starting with CAFTA-DR in 2006, refer to an “appellate body or similar mechanism”, envisaging the implementation of an appellate mechanism for arbitral awards issued under the ISDS provisions. At government level, in the period 2008-2010, there were also discussions initiated by Latin American states about the introduction of an optional protocol attached to the ICSID Convention and dealing with an appellate body, similarly an appeals mechanism was discussed in the UNASUR negotiations during the same

²⁵ Typically oral hearings are limited to 60 minutes.

²⁶ https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf. The guidance to counsel suggested in many places the need for conciseness and avoidance of repetition,

²⁷ ICSID, ‘Possible Improvements and the Framework for ICSID Arbitration’ [2004]. But see Barton Legum, ‘Options to Establish an Appellate Mechanism for Investment Disputes’ in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes*, (OUP 2008), 231-239, who traces back the appellate mechanism to an initiative of the US, in 2002, when the Congress enacted the Bipartisan Trade Promotion Authority Act and which identified for US free trade agreements a negotiating objective of “providing for an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in the trade agreements”. (p. 232)

period; this was largely in direct response to inconsistent decisions against Argentina dealing with the state of necessity defence (*LG&E*, *Enron*, *Sempra* etc).

The task of this group is confined to determining the merits and demerits of adding an appellate mechanism to the current ISDS system in the context of the elements affecting the duration of proceedings. As such it is not within the purpose of this short paper to review the overall suitability and viability of the proposal, i.e. for example, whether in terms of desirability and consequences on the finality of arbitral awards or on the consistency and transparency in ISDS, an appellate mechanism would be the proper solution. There are numerous ramifications of this issue, which arise not only from the nature of the dispute resolution mechanism, but also from the heterogeneous nature of the system. A first step in assessing the viability of such mechanism will necessarily have to take into consideration whether this appellate mechanism would be fit to address all types of investment arbitral awards, be it proceedings under the UNCITRAL Arbitration Rules or the SCC Arbitration Rules or under the ICSID Convention and stemming from investment contracts (even though this might be outside of the scope of the UNCITRAL Working Group) or international investment agreements etc. The choice between a “one size fits all” approach and several appellate mechanisms is likely to have effect not only on the efficiency of the system, but also on the time component discussed below. We are not in a position here, as well, to assess whether there is room for such an appellate mechanism under the ICSID Convention, given the provisions of Art. 53(1) of the ICSID Convention.²⁸ It should be pointed out that the advantages and disadvantages of an appellate mechanism with regard to duration of proceedings depend heavily on the way in which such a mechanism is constructed.

1) Advantages

1. If constituted as the only available (or consolidated) mechanism excluding other mechanisms, such as the annulment procedure under the ICSID Convention or the setting aside procedure for non-ICSID arbitral awards, an appellate mechanism could save significant time in terms of procedure. As such, the system could consider the challenge of an arbitral award based on the existence of a procedural irregularity, as set out in Article 52 of the ICSID Convention, as well as for well-defined errors of law and, possibly of fact (within a narrow definition, arguably).

Depending on the structure of the appellate facility/body – whether constituted in a similar manner as the WTO Appellate Body or not – the constitution of the panel that will hear the appeal, as well as the time in which this would reach a solution, could arguably be faster than, at least, court proceedings in setting aside cases or the ICSID ad hoc annulment system.

2. The appellate mechanism could save significant time in terms of a final resolution to the case, if, in case of admitting the appeal in part or in full, the appellate body will be

²⁸ Art 53(1) of the ICSID Convention:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

As already indicated, in the ICSID context an appellate mechanism could be introduced by way of a separate treaty or protocol or through a potential lengthy and onerous revision of the ICSID Convention. See Jan Paulsson, ‘Avoiding Unintended Consequences’ Disputes’ in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes*, (OUP 2008), 241-265, p. 259:

‘The ICSID Convention does not contemplate an appellate mechanism. To the contrary, being internationally enforceable ICSID awards are inherently unable to accommodate the intrusion of an appellate mechanism.’

entrusted with the power to retain the case and render a new arbitral award. As such, no remedy against the decision of the appellate body or against the new award rendered following the appeal will be contemplated. In this way, the appellate mechanism would be the second and final instance of ISDS proceedings with a well-defined jurisdictional threshold. This could be, probably, the major advantage of such an appellate mechanism, which would allow for a speedy and final resolution of the dispute.²⁹

If we look at the current ICSID system,³⁰ the authority of the ICSID Annulment Committee is limited under Art. 52(6) of the ICSID Convention.³¹ As such, the Annulment Committee may decide to annul the award in full or in part or to reject the annulment only. The Committee does not have the competence to keep the dispute and issue a new arbitral award. If an award is annulled, whether in full or in part, the dispute has to be resubmitted to generate a new arbitral award, which in turn, can be annulled in full or in part and the dispute resubmitted and a new arbitral award issued, and so on. The decision of the Committee will be final if the Committee decides that the dispute falls outside the jurisdiction of the ICSID.

As shown in the table below, the resubmission of the case after the annulment proceedings has the potential to add between 5 and 10 years – or even more, where the proceedings are still pending. This duration could certainly be reduced under the provisions of an appellate mechanism, as mentioned above.

Case	Award	Decision of Ad Hoc Committee	Second Award	Second Decision of Ad Hoc Committee
Amco Asia Corporation and others v. Republic of	20 November	16 May 1986	5 June 1990	17 December 1992

²⁹ Supporting this position, see Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?' in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff, 2015), 437-442, at pp. 441-442; Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: The Appeal Proposal', in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff, 2015), 455-473, pp. 471-472.

³⁰ Arguably, the setting aside proceedings in national courts are likely to add similar time burden, if not more. In the *Yukos Cases* (*Yukos Universal Ltd v. Russian Federation*, PCA AA 227; *Hulley Enterprises Ltd v. Russian Federation*, PCA AA 226; and *Veteran Petroleum Trust v. Russian Federation*, PCA AA 228), for example, the arbitral tribunal rendered the award on 18 July 2014 and the Respondent commenced the setting aside proceedings in the Hague, with the Hague District Court rendering the decision on 20 April 2018. The judgment of the Hague District Court is now appealed by the investors and the proceedings are pending in the Hague Court of Appeal. The judgment of the Court of Appeal is subject to appeal, on limited grounds, before the Supreme Court.

See also *Renta v. Russia* (*Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007), where the arbitral tribunal rendered the award on 20 July 2012, the Stockholm District Court dealt with the setting aside procedure by judgment of 14 September 2014 and Svea Court of Appeal granted the appeal against the judgment of the District Court on 18 January 2016.

³¹ Art. 52(6) of the ICSID Convention:

If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Indonesia (ICSID Case No. ARB/81/1)	1984			
Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2)	21 October 1983	3 May 1985	26 January 1988	17 May 1990
Maritime International Nominees Establishment v. Republic of Guinea (ICSID Case No. ARB/84/4)	6 January 1988	22 December 1989	- <i>Discontinued, 20 November 1990</i>	
Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3)	21 November 2000	3 July 2002	20 August 2007	10 August 2010
Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2)	8 May 2008	18 December 2012	13 September 2016	- <i>pending</i>
Enron Creditors Recovery Corporation v. Argentine Republic (ICSID Case No. ARB/01/3)	22 May 2007	30 July 2010	- <i>Discontinued, 19 July 2018</i>	
Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16)	28 September 2007	29 June 2010	- <i>Discontinued, 3 April 2015</i>	
TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23)	19 December 2013	14 August 2015	- <i>pending</i>	

3. An appellate mechanism could also ensure the expeditious enforcement of arbitral awards. The design of the appellate mechanism could deal with issues of enforcement of an arbitral award pending the appeal and ensure for a timely resolution of the dispute that the relevant party provides the financial security in the amount of the award, while the appellate process is pending.³² Further, if the appellate mechanism is designed as a limited and final second instance within the ISDS system, enforcement ought to be automatic.

2) Disadvantages

³² See the current proposal for the amendment of the ICSID Arbitration Rules, and, in particular the new Arbitration Rules 67, which sets a detailed procedure for the stay of enforcement of arbitral award during the annulment proceedings.

1. If the proposed appellate mechanism is considered as an addition to the existing remedies against arbitral awards, i.e. setting aside proceedings in the courts at the place of arbitration, annulment under the ICSID Convention, etc., it will necessarily add significant delays in obtaining a final resolution of the dispute. It would become a *de facto* and *de jure* third instance of ISDS proceedings.

2. Different grounds for appeal may add additional time to the proceedings. For example, a review on error of facts, no matter how narrowly defined, will likely slow down the overall process. Widening the jurisdiction could imply a full re-hearing of the case unduly lengthening the process.

At this stage it is impossible to assess with precision the specific impact an appellate mechanism would have on duration. However, if an appellate mechanism is appropriately designed, abolishes alternative routes such as annulment and setting aside processes, introduces clear time-limits, limits itself to legal issues and does not allow a re-hearing of the evidence, it could have a positive impact.

VII) The Multilateral Investment Court (MIC)

The next proposal to scrutinize with respect to duration of proceedings is the proposal to establish a Multilateral Investment Court (MIC).

The duration of proceedings of a MIC can be addressed in the treaty that creates the MIC. As described in section III in the context of trade law and the World Trade Organization (WTO), WTO members set forth strict time limits for each stage of the proceeding. The trade law context, however, is very different from the investment law context in that states are only respondents in investment law (as currently structured). Thus, states may be less interested in strict timelines for ISDS proceedings than in trade law where they are both complainants and defendants. Moreover, the remedies in investment law provide for compensation, with compounding interest, unlike in trade law where the remedies are only prospective. Thus, the duration of proceedings has less of an impact in terms of a party's ultimate remedy in investment law.

It is difficult to predict how a MIC would work in practice. However, to the extent that discussions in UNCITRAL lead to the creation of a MIC shaped on the EU Investment Court System, one can imagine the factors that would be relevant analysing CETA and the EU-Vietnam FTA. These agreements provide blueprints for the MIC currently proposed by the EU.³³ At the end of this section, we summarize the provisions of CETA and the EU-Vietnam FTA regarding the duration of dispute settlement proceedings.

1) Advantages

1. The MIC model could be more expeditious in terms of different phases of the proceedings, thus reducing their total duration. To start, the constitution of the tribunals could be more expeditious as a result of the fact that in standing (as opposed to *ad hoc*) bodies the adjudicators are pre-elected. In arbitral proceedings, the constitution of the tribunal can become disputed and takes an average of over 6 months as described above. Provisions in both CETA and the EU-Vietnam FTA, in contrast, establish that the president of the tribunal must appoint 3 members to constitute the tribunal within 45 days.

2. International investment agreements (IIAs) typically do not regulate party challenges to appointed arbitrators. In practice, such challenges can last 4 months on average for

³³ The European Commission, "The Multilateral Investment Court Project", Brussels, 21 December 2016 - Latest update on 10 October 2018, <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>> 'accessed 16 October 2018'

ISDS. Both CETA and the EU-Vietnam FTA reduce the time for such challenges to 45 days. The members of the MIC are already pre-approved and are members of a standing judicial body, which reduces the grounds for challenges.

3. IIAs usually regulate the first phase of ISDS arbitral proceedings, including the request of consultations and the notice of intent before submitting a claim. However, they usually do not specify procedural rules with time limits for every phase of the proceedings. Rather, most investment agreements usually refer to ICSID or UNCITRAL arbitration rules, which do not provide for specific time limits for the proceedings and do not regulate all phases in the proceedings, which can result in delays.

In terms of the duration of actual proceedings, a MIC also could be shorter than ISDS arbitral proceedings today. As noted in Section 1, ISDS proceedings take 3.73 years on average (although arbitral proceedings infrequently can last less than 2 years). In comparison, CETA provides that the investment court (IC) must issue its final award within 24 months (CETA) or its partial award within 18 months (EU-Vietnam) from the date the claim is submitted. In theory, the IC then should have more expeditious proceedings. However, as in the case of the WTO, the IC model could give rise to time delays as a function of the caseload and the complexity of cases.

4. The duration of appeals should be compared against that of annulment proceedings. Today, (decided) annulment proceedings take 1.91 years or 697 days on average. In contrast, the EU-Vietnam FTA regulates the time limit for the appeal to be between 180-270 days from the date of notification of appeal, which in turn must be within 90 days of the issuance of the award. Again, as with the WTO, however, if the caseload accumulates and involves complex facts, this time limit might not be practical or desirable because of the implications for the award's quality and the ability of under-resourced countries to participate effectively.

The proposed MIC, at least as reflected in CETA and the EU-Vietnam FTA, could reduce the duration of proceedings compared to ICSID. These two treaties do not regulate the duration of all matters, such as time limits for the submission of memorials, the duration of hearings, and the issue of bifurcation of proceedings (which issues are left for the parties and the members of the tribunal). But they do regulate the duration for the constitution of the tribunal, for challenges to arbitrators, and for the issuance of the final award.

6. The structure of payment of members of the tribunal could affect the duration of proceedings in practice. If members of a tribunal are paid a set salary, then they have less incentive to drag out a case than if they are paid on an hourly basis.

2) Disadvantages

1. In theory, a MIC has a set number of members and so is less flexible to adapt to an increasing caseload involving complex cases compared to *ad hoc* arbitrations. However, in practice, many ISDS arbitrators are assigned to many cases under the current system, which also reduces the flexibility of the system and leads to delays.

2. The duration of proceedings in the MIC will depend to a large extent on how the court is administered.

3. The appointment process of the judges of a MIC is likely to be politicised, potentially leading to vetoes and having a negative impact on the settlement of disputes.³⁴

³⁴ José M Alvarez Zárte, Legitimacy Concerns of the Proposed Multilateral Investment Court, 59 BCL Rev. 2765 (2018)

CETA	EU-Vietnam FTA. Section 3.
Consultations shall be held within 60 days of the request for consultations. Art. 8.19.1	Consultations shall be held within 60 days of the request for consultations. Art. 4.4
Same. Art. 8.19.8	18 months as time limit to submit a claim after the request for consultations. Art. 4.5
Consultation period of 90 days; afterwards the investor can submit a notice requesting determination of the respondent. Art. 8.21.1	Consultation period of 90 days; afterwards the investor can submit a notice of intent. Art. 6.1
50-day period for the EU to inform who will act as Respondent after the investor submits a notice requesting a determination of the respondent. Art. 8.21.4	60-day period for the EU to determine who will act as Respondent. Art. 6.2
At least 180 days from the submission of the request for consultations and at least 90 days from the notice... must have elapsed to submit a claim to the tribunal. Art. 8.22.1.b	At least 6 months from the submission of the request for consultations and at least 3 months from the notice of intent must have elapsed to submit a claim to the tribunal. Art. 7.1
The submission of claims may be under ICSID, ICSID AF or UNCITRAL Arbitration Rules. Art. 8.23.2	The submission of claims may be under ICSID, ICSID-AF or UNCITRAL Arbitration Rules. Art. 7.2
Within 90 days of the submission of a claim, the President of the Tribunal shall appoint 3 members. Art. 8.27.7	Within 90 days of the submission of a claim, the President of the Tribunal shall appoint 3 members. Art. 12.7
The Tribunal shall issue its final award within 24 months of the date the claim is submitted. Any delay must be justified. Art. 8.39.7	The Tribunal shall issue a provisional award within 18 months of the date of submission of the claim. Delays must be justified. Art. 27.6
90 days after the award has been issued, a disputing party may appeal. Article 8.28.9	90 days after the award has been issued, a disputing party may appeal. Art. 28.1
	The appeal award shall be issued between 180 days and 270 days from the date a party notifies its decision to appeal. Art. 28.5
The notice of challenge shall be sent within 15 days of the date of composition of the Tribunal or the date the party acquired knowledge. Art. 8.30.2	The notice of challenge shall be sent within 15 days of the date of composition of the Tribunal or the date the party acquired knowledge. Article 14.2
If the arbitrator does not resign, the President of the International Court of Justice shall issue a decision within 45 days of the date of receipt of the notice of challenge Art. 8.30.3	If the arbitrator does not resign, the President of the Tribunal shall issue a decision within 45 days of the date of receipt of the notice of challenge. Art. 14.3

VIII) Abolition of ISDS

This section examines the likely duration of binding, adjudicative proceedings to resolve foreign investment disputes in the absence of ISDS. It is divided into three sub-sections dealing, respectively, with:

- i. State-state arbitration under investment treaties
- ii. Investor-state arbitration under investment contracts (we note that this might be outside of the scope of the UNCITRAL WG)
- iii. Litigation against the host state in domestic courts

It is important to clarify that these options are not mutually exclusive. Indeed, in many situations all three options are available under current international/domestic law in relation to the same underlying dispute, and exhaustion of internal remedies can at times be required.

1) State-to-state arbitration under investment treaties

There are only three known state-state arbitrations under investment treaties. These arbitrations provide some rough guidance on the duration of such proceedings, but care should be taken in drawing conclusions from such a small number of cases. Changes to the procedural rules governing future state-state arbitrations could also increase or decrease the duration of such proceedings.

The first of the three known cases, a dispute between Chile and Peru, was discontinued, so provides little insight into the duration of such proceedings. The second was an arbitration between Ecuador and the US concerning the interpretation of the BIT between the two states. In that case, the tribunal handed down its award rejecting jurisdiction one year and three months after Ecuador lodged its request for arbitration.³⁵ The third was an arbitration between Italy and Cuba concerning Italy's claim under the BIT between the two states. In that case, the final award was issued four and a half years after Italy lodged its request for arbitration.³⁶ It should be pointed out that state-to-state investment arbitrations may involve diplomatic protection: the state makes a claim because of injury suffered by the investor. The consequence is that generally (unless provided otherwise) internal remedies need to be exhausted.

While technically not claims under an investment treaty, the set of arbitrations between the US and Canada under the United States-Canada Softwood Lumber Agreements raised investment-related issues that had previously been the subject of investor-state arbitration under NAFTA's Chapter 11. These disputes provide further guidance on the duration of analogous state-state arbitrations. The US request for arbitration in relation to the Quebec and Ontario softwood lumber programs was issued on 18 January 2008.³⁷ The tribunal's final award was issued on 20 January 2011, almost exactly three years later.³⁸ In 2013, the parties jointly lodged a request for clarification of the award. This additional stage of proceedings took a further 6 months.³⁹

Taken together, these examples suggest that the resolution of investment disputes through state-state arbitration is roughly comparable in duration to the resolution of

³⁵ <https://www.italaw.com/sites/default/files/case-documents/italaw7940.pdf>

³⁶ https://www.italaw.com/sites/default/files/case-documents/ita0435_0.pdf

³⁷ <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/on-01.pdf>

³⁸ <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/on-12.pdf>

³⁹ <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/lc-05.pdf>

those disputes through investor-state arbitration. However, it should be born in mind that where domestic remedies have to be exhausted, this adds significant delay to the process.

2) Investor-state arbitration under investment contracts

Investors and host states can give advance consent to investor-state arbitration of disputes arising under an investment contract between them. Recent ICSID case-load statistics show that there have been 16% of ICSID arbitrations have been based on contractual consent to arbitration.⁴⁰ Of course, investor-state arbitration under investment contracts is also possible outside the ICSID system under other procedural rules. Such arbitrations do not necessarily become public knowledge.

While the substantive law in investor-state arbitration under an investment contract may differ from the substantive law to be applied in investor-state arbitration under investment treaties, the process of arbitration in each case is essentially the same. For example, the ICSID Convention itself and the ICSID Arbitration Rules enacted under the ICSID Convention apply equally regardless of whether consent to arbitration is established through a contract or a treaty. However, and despite these obvious similarities, an empirical analysis shows that contract-based ISDS proceedings are slightly shorter in duration – and that in most models the difference was statistically significant. The difference in duration can also not be explained by the fact that contract-based proceedings dominated during the first period of investment arbitrations. However, the difference is not very large.⁴¹

3) Litigation against the host state in domestic courts

Comparing the duration of investor-state arbitration to litigation in domestic courts (assuming litigation options exist) raises considerable conceptual and empirical challenges. A major conceptual challenge is identifying the type of domestic litigation that investor-state arbitration should be compared to. Proceedings brought in national courts can involve a whole number of relevant legal rules – including constitutional law, administrative law and contract law (including the legal provisions governing state contracts in jurisdictions in which the regulation of state contracts differs from that of ordinary private law contracts). In domestic legal systems, these different causes of actions may engage different domestic courts/tribunals, which operate under different procedures. This has implications for the duration of proceedings. A different conceptual challenge concerns accounting for the possibility of appeal in domestic proceedings. The decisions of arbitral tribunals are not subject to appeal but they can be, and often are, challenged through annulment or set-aside proceedings.

Empirical challenges include the fact that the duration of domestic court proceedings appears to vary enormously depending on the state in question, the domestic court/tribunal involved, the cause of action and the complexity of the case.

These challenges are illustrated by examples in which domestic court proceedings and investor-state arbitration have examined the same underlying factual situation. For

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[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf)

⁴¹ Daniel Behn et al., *Why the Delay? Explaining the duration of proceedings in investor-state dispute settlement cases.*

example, foreign tobacco companies challenged Australia's Tobacco Plain Packaging Act through both Australian court proceedings and investor-state arbitration. Domestic court proceedings were initiated the day the legislation entered into force. A final judgment was rendered by Australia's highest court less than a year later. Faced with essentially the same dispute, the arbitral tribunal in *Philip Morris Asia v Australia* took over four years from the notice of arbitration to render an award on jurisdiction, and a further eighteen months to render a final award on costs. In contrast, the investor-state arbitration in *Chevron v Ecuador* arose out of the extreme delays in Chevron's attempts to resolve commercial disputes in Ecuadorian courts. With these court cases unresolved after more than a decade, Chevron commenced investor-state arbitration. Within four and a half years of the notice of arbitration, the tribunal had rendered its final award.⁴²

Bonnitcha, Poulsen and Waibel (2017), attempt a more systematic comparison of the duration of investor-state arbitration to commercial litigation in domestic courts. A table summarising their findings is reproduced here:

Table 3.4 Average length of civil litigation

Country (overall 'Doing Business' ranking in brackets)	Average length (in years) to obtain and enforce final judgment (Doing Business 2016)	Average length (in years) to obtain first-instance decision (ICLG 2016)	Average length (in years) to obtain decision (2013 data)		
			First	Second	Final
England & Wales (33)	1.2*	1.5	0.9		
France (14)	1.1	–	0.8	0.9	0.9
Germany (12)	1.2	0.8	0.5	0.6	
Italy (111)	3.1	3.5	1.5	3.0	3.3
India (178)	3.9	7.5	–	–	–
United States (21)	1.0	1.5**	–	–	–
Switzerland (46)	1.1	1.5	0.4	0.4	0.3

* United Kingdom as a whole; ** denotes California only

Source: Author compilation, based on Doing Business (2016); International Comparative Legal Guides (ICLG) (2016); and OECD (2013).

It is important to note the limits of this exercise and the reliance on different sets of data. The three data-sets collated by Bonnitcha, Poulsen and Waibel measure the duration of disputes in which, on average, less money is at stake than the average investor-state arbitration. Nevertheless, this exercise suggests that investor-state arbitration is, on average, significantly slower than domestic court proceedings in some countries (e.g. Switzerland or Japan), while being significantly quicker than domestic court proceedings in others (e.g. India or Italy).

The possible impact of the various reform options discussed in this paper is visualised in the following chart:

Concern Scenario	IA improved	IA+ appeal	MIC	No ISDS
s				

⁴² This final award was subject to several further years of litigation, during which Ecuador tried unsuccessfully to have the award set aside in Dutch courts.

Duration of establishing the tribunal	+ ⁱ	~ ⁱⁱ	+ ⁱⁱⁱ	~ ^{iv}
Addition al duration of bifurcati on	+ ^v	~ ^{vi}	~ ^{vii}	~ ^{viii}
Addition al duration of challeng es to the award	+ ^{ix}	~ ^x	~ ^{xi}	~ ^{xii}
Length overall	+ ^{xiii}	✓~ ^{xiv}	~ ^{xv}	~ ^{xvi}

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ⁱ A proposal to simplify the establishment of the tribunal can be made, which would speed up the establishment, but there are trade-offs as to the right to select arbitrators.

ⁱⁱ The proposal does not tackle this specific cause of delay.

ⁱⁱⁱ A MIC largely pre-establishes the tribunal. The trade-off consists in limiting the right to select arbitrators.

^{iv} The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.

^v Bifurcation could be abolished through a corresponding proposal.

^{vi} The proposal does not tackle this specific cause of delay.

^{vii} The proposal does not tackle this specific cause of delay.

^{viii} The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.

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- ix Challenges to awards could be limited. The trade-off in this regard is that the right to challenge potentially flawed awards is limited.
- x As described in the section the effect of an appeal can differ.
- xi The proposal does not tackle this specific cause of delay.
- xii The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.
- xiii Specific proposals can speed up proceedings. But such proposals come with trade-offs.
- xiv The effect of this reform on the length of proceedings is unclear.
- xv The effect of this reform on the length of proceedings is unclear.
- xvi The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.